(3)

No. 98-476

FILED
NOV 3 - 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

ARTHUR CALDERON, Warden, California State Prison at San Quentin, *Petitioner*,

v.

ALFRED P. DYER, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
RONALD A. BASS
Senior Assistant Attorney General
PEGGY S. RUFFRA
Supervising Deputy Attorney General
DANE R. GILLETTE
Senior Assistant Attorney General
Counsel of Record
50 Fremont St., Room 300
San Francisco, CA 94105
Telephone: (415) 356-6202
Fax: (415) 356-6486
Counsel for Petitioner

10 pp

TABLE OF CONTENTS

		Page
A.	The new independent duty to investigate	1
B.	Implied bias	4

TABLE OF AUTHORITIES

	Page
Cases	
Dyer v. Calderon 151 F.3d 970 (9th Cir. 1998)	1
Estelle v. McGuire 502 U.S. 62 (1991)	2
Herrera v. Collins 506 U.S. 390 (1993)	4
Keeney v. Tamayo-Reyes 504 U.S. 1 (1992)	3
Lindh v. Murphy 117 S.Ct. 2059 (1997)	3
People v. Dyer 45 Cal.3d 26 246 Cal.Rptr. 209 (1988)	3
Smith v. Phillips 455 U.S. 209 (1982)	2
Stringer v. Black 503 U.S. 222 (1989)	5
Teague v. Lane 489 U.S. 288 (1989)	1
Townsend v. Sain 372 U.S. 293 (1963)	3

TABLE OF AUTHORITIES, CONT'D

Statutes

28 United States Code
§ 2254(d)(3) 3

Antiterrorism and Effective Death Penalty
Act of 1996 (AEDPA) 3

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998
No. 98-476

ARTHUR CALDERON, Warden, California State Prison at San Quentin, *Petitioner*,

v.

ALFRED P. DYER, *Respondent*.

Respondent Alfred Dyer contends that certiorari should not be granted because the Ninth Circuit en banc panel: (1) properly criticized the state trial court's failure to conduct a more detailed hearing on the allegation of juror misconduct but did not impose any new duties on state courts, and (2) did not establish a new rule of implied bias in violation of *Teague v. Lane*, 489 U.S. 288 (1989). Dyer's arguments demonstrate a profound misunderstanding of the limited extent to which a federal habeas corpus court may review a state criminal judgment.

C. The new independent duty to investigate

The Ninth Circuit determined that a trial judge has "an independent responsibility" to examine a claim of juror misconduct or bias. *Dyer v. Calderon*, 151 F.3d 970, 978 (9th Cir. 1998) (en banc); App. A at 16-17. Dyer insists that the circuit court did nothing improper because "[t]rial courts have long taken it upon themselves to conduct such factual inquiries, and appeals courts have long taken trial courts to task for failures to do so." Opp. at 13. That

assertion, supported only by citation to two federal prosecutions, misses the point.

This Court emphasized in *Smith v. Phillips*, 455 U.S. 209, 221 (1982) that federal habeas courts have "no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension." Thus, the scope of inquiry which a federal district court may apply to review of a juror misconduct claim in a federal criminal prosecution, or which a federal circuit court may impose upon the district courts in such cases, cannot apply to the review of such claims by state courts unless those duties are constitutionally mandated.

In *Smith* the Court determined that when juror partiality is challenged, the Due Process Clause requires only that a trial court conduct "a hearing in which the defendant has the opportunity to prove actual bias." *Id.* at 215, 218. It did not instruct state trial courts to take responsibility for gathering evidence, conducting examinations, or calling witnesses. The state court gave Dyer an opportunity to prove actual bias by examining Ms. Freeland, whom the judge had already seen twice during the voir dire proceedings, and later allowing Dyer to revisit the issue as part of a motion for new trial. Dyer's counsel did not pursue the lines of inquiry which the Ninth Circuit now finds significant and the trial court was under no constitutional imperative to do so on its own. By effectively imposing such a duty on state courts, the en banc panel exceeded its authority in this habeas corpus proceeding.[1]

---

1. Dyer's suggestion that the California Supreme Court already imposes a duty of inquiry on state trial courts, Opp. at 13, is both incorrect and irrelevant. Unless such procedure, the scope of which Dyer fails to describe, is constitutionally mandated, it is at most a requirement of state law. Federal habeas corpus relief cannot be premised on alleged violations of state law. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). Obviously, there was no prejudicial

The Ninth Circuit found that it need not honor the presumption of correctness applicable to state court factual findings because the material facts were not adequately developed in the state court hearing under former 28 U.S.C. § 2254(d)(3).[2] 151 F.3d at 979; App. A at 18-19. Dyer asserts that if a federal habeas court finds the record inadequate, the reason for its incomplete development is irrelevant. However, a habeas petitioner who fails to develop a claim in state court may not obtain a federal evidentiary hearing on that claim unless he can demonstrate cause for the default and prejudice. *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 11-12 (1992). Although *Tamayo-Reyes* involved the right to an evidentiary hearing pursuant to *Townsend v. Sain*, 372 U.S. 293 (1963), rather than the presumption of correctness in former § 2254(d), the policy concerns are identical. Allowing a state prisoner to shift responsibility for his failure to develop the record to the trial court would relieve him of his obligation to present evidence in state court and render the presumption of correctness meaningless. The Ninth Circuit's reasoning also eviscerates *Tamayo-Reyes*. Indeed,

---

deprivation of state law here: the judgment was affirmed on direct appeal. Indeed, the state supreme court refused to consider some of the material relied upon by the Ninth Circuit because Dyer had failed to present it to the trial court, despite a request from the court for all relevant information to support the claim of juror misconduct. *People v. Dyer*, 45 Cal.3d 26, 59, 246 Cal.Rptr. 209, 228 (1988).

2. Dyer suggests that certiorari should be denied because the presumption of correctness in former § 2254(d) has been superceded by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). A presumption of correctness for state court factual findings was retained by the AEDPA in § 2254(e)(1), albeit without the various exceptions of the former section. Proper application of the § 2254(d) presumption remains important to future interpretation of § 2254(e)(1), as well as for the numerous ongoing federal habeas corpus actions to which the AEDPA will not be applied. *See Lindh v. Murphy*, 117 S.Ct. 2059 (1997).

applying that case, the District Court expressly found Dyer had failed to develop material facts in the state trial court proceedings. App. C at 158-162. That same failure compels rejection of the Ninth Circuit's refusal to honor the presumption of correctness for factual findings resulting from the hearing.

Dyer endorses the en banc court's conclusion that development of the state record may be deemed inadequate if additional facts are uncovered in subsequent proceedings. Opp. at 11-12; *see* 151 F.3d at 976; App. A at 12. That new evidence may be found or arguments formulated years after a trial is hardly suprising. *Cf. Herrera v. Collins*, 506 U.S. 390, 423 (1993) (O'Connor, J., concurring) (presentation of affidavits vouching for a condemned inmate's innocence "are not uncommon"). Concerns for comity and finality preclude reliance on a rule which determines the adequacy of a state hearing not by consideration of the proceedings at the time they took place but solely by evidence developed years later. The hearing in Dyer's case was fair when conducted; it is rendered no less fair fifteen years later by additional information not presented to the state court.

D. Implied bias

Dyer contends that the Ninth Circuit's reliance on implied bias did not violate *Teague*, but he avoids discussing any of the retroactivity cases discussed in the petition for writ of certiorari. Two points require a brief response.

First, while acknowledging that the concurring and dissenting opinions in *Smith v. Phillips*, 455 U.S. 209, which questioned whether the majority had limited juror bias cases to actual bias, Dyer denies their significane by observing that no other court has actually found *Smith* eliminated implied bias. Opp. at 16-17. However, the very

existence of such a debate among the Justices of this Court demonstrates that reasonable jurists could disagree on application of an implied bias doctrine. As such, state courts are under no compulsion to adopt it and reversal of a state criminal conviction based on implied bias contravenes the limits on habeas corpus review established by *Teague*. That state courts may have adopted or applied implied bias in some cases does not establish that they were constitutionally compelled to do so. Absent such compulsion the rule cannot be applied retroactively on habeas corpus.

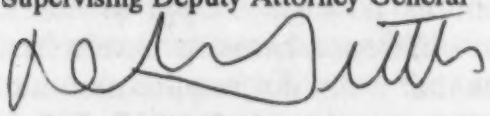
Second, Dyer asserts that this Court need not explicitly endorse a rule in order to avoid the *Teague* limitations. Indeed, he asserts that the absence of such endosement "is an indication of how well-entrenched the rule is, not its novelty." Opp. at 18-19. There is a substantial difference between a rule "so evident" from prior cases that it did not require mention in subsequent decisions, *Stringer v. Black*, 503 U.S. 222, 235 (1989), and a rule which the Court has avoided or found it unnecessary to reach. Because this Court has never held, or even suggested, that state courts are constitutionally

obligated to apply a rule of implied bias in cases of alleged juror bias, the Ninth Circuit's reversal of Dyer's convictions and death sentence on such ground violated *Teague*.

Dated: November 2, 1998.

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
RONALD A. BASS
Senior Assistant Attorney General
PEGGY S. RUFFRA
Supervising Deputy Attorney General



DANE R. GILLETTE
Senior Assistant Attorney General
Counsel of Record

Counsel for Petitioner

DRG:pl
SF1989XW0007

No. 98-476

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

ARTHUR CALDERON, Warden, California State Prison
at San Quentin, *Petitioner*

v.

ALFRED P. DYER, *Respondent*

CERTIFICATE OF SERVICE BY MAIL

DANE R. GILLETTE, a member of the Bar of the Supreme Court of the United States, states:

That his business address is 50 Fremont Street, Suite 300, in the City and County of San Francisco, State of California; that on November 2, 1998, he served three true copies of the Reply To Brief In Opposition To Petition For Writ Of Certiorari in the above-entitled matter on the respondent by placing same in envelopes addressed as follows:

Jon B. Streeter
Keker & Van Nest LLP
710 Sansome Street
San Francisco, CA 94111

W. Reece Bader
Shelley J. Sandusky
Orrick, Herrington & Sutcliffe LLP
1020 Marsh Road
Menlo Park, CA 94025

Said envelopes were then sealed and deposited in the United States mail at San Francisco, California, with the postage thereon fully prepaid.

DANE R. GILLETTE
Senior Assistant Attorney General